IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ERIC J. BLATSTEIN	:	CIVIL ACTION
IN RE: MAIN, INC.	:	No. 97-3739

O P I N I O N

Padova, J. August 26, 1997

After Lessee defaulted, Lessor sued and obtained a judgment by confession for, inter alia, accelerated rent. The Lessee subsequently declared bankruptcy. The Bankruptcy Court reduced amount of the Lessor's confessed judgment pursuant to 11 U.S.C.A. § 502(b)(6) ("Allowance of claims or interests") (West 1993 & Supp. 1997). The Lessor appeals the Bankruptcy Court's application of § 502(b)(6). For the following reasons, I will affirm in part, reverse in part, and remand to the Bankruptcy Court for further proceedings consistent with this Opinion.

I. Factual Background

A. Lease, Loan, and Letter Agreement

In July, 1987, Eric J. Blatstein entered into a commercial lease ("Lease") with 718 Arch Street Associates, Ltd. ("Arch") to lease premises located at 718 Arch Street in Philadelphia. Blatstein intended to operate the property as the Phoenix nightclub. Technically, the Lease was executed between Arch and Archco Enterprises, Inc. ("Archco"), a corporation owned by

Blatstein. Archco gave Arch a security deposition totaling $6,416 at that time. In re Main, Inc., No. 96-19098DAS, at *6 (Bankr. E.D. Pa. Apr. 23, 1997).

In March, 1988, a new lease was executed to permit Arch to increase the square footage of the premises Archco leased, and a security deposit of an additional $10,000 was supplied. Id. at *7. The Lease provided for specified monthly payments over a 15 year period as follows:

Original Space

	Base Rent	Amortized Improvement Costs	Total Rent
Year 1	$57,749.25	$25,587.36	$83,336.61
Year 2	$82,922.00	$25,587.36	$108,509.36
Year 3	$88,845.00	$25,587.36	$114,432.36
Year 4	$94,768.00	$25,587.36	$120,355.36
Year 5	$100,691.00	$25,587.36	$126,278.36
Yr. 6-10	$134,748.25	$25,587.36	$160,335.61
Yr. 11-15	$165,844.00	$0	$165,844.00

Expansion Space

	Base Rent
Year 1	$25,200.00
Year 2	$36,400.00
Year 3	$39,200.00
Year 4	$42,000.00
Year 5	$44,800.00
Yr. 6-10	$60,900.00
Yr. 11-14	$75,600.00
Year 15	$6,300.00 per mo.

Basement Space

	Base Rent
Year 1	$4,537.50
Year 2	$6,655.00
Year 3	$7,260.00
Year 4	$7,865.00
Year 5	$8,470.00
Year 6	$9,075.00
Year 7	$9,680.00
Year 8	$10,285.00
Year 9	$10,890.00
Year 10	$11,495.00
Yr. 11-15	$13,310.00

(Br. of Appellant 718 Arch Street Assocs., Ltd. Ex. 10 ("Arch Br.") (Lease for the "Cast Iron Building, 718 Arch Street at Independence Center")). In addition to the Lease, Arch loaned Blatstein $227,180 ("Loan"). The Loan was to be used operating the nightclub. To protect the Loan, Arch had a perfected security interest in all furniture, fixtures, and equipment used in connection with the nightclub.

In 1989, Archco filed for bankruptcy under Chapter 11. In that proceeding, Archco filed a motion to assume the Lease. Arch demanded that Archco cure the arrearages. The Bankruptcy Court, however, authorized Archco to assume the Lease. In re Main, Inc., No. 96-19098DAS, at *7 (Bankr. E.D. Pa. Apr. 23, 1997).

Blatstein eventually proved unable to satisfy his obligations under either the Lease or the Loan. On January 31, 1992, Arch and Blatstein entered into a letter agreement ("Letter Agreement") which modified Blatstein's payment obligations in an attempt to prevent total default and cure arrearages. Failure to satisfy the payment schedule under the Letter Agreement constituted default of the Lease and Loan obligations. Upon such default, Arch had to allow Blatstein seven days within which to cure. Blatstein eventually defaulted under the Letter Agreement, and Arch provided notice of the default on April 6, 1992.

On the evening of April 6, 1992, Blatstein attempted to remove equipment, inventory, fixtures, and furniture from the nightclub. Upon discovering Blatstein's attempt to remove the collateral securing the Loan, Arch changed the locks on the nightclub doors. (Arch Br. Ex. 2 (718 Arch Street Assocs., Ltd. v. Blatstein, No. 334 Philadelphia 1993 (Pa. Super. Ct. Aug. 31, 1993)).

Arch subsequently re-leased part of the premises to Illusions, Inc. ("Illusions") in June, 1993. Illusions provided Arch with a security deposition of $11,000 and monthly rent of

$5,500, beginning in 1993. In October, 1994, a mortgagee of Arch foreclosed on the property, which ended Illusion's lease.

B. State Court Proceedings

On November 12, 1992, Arch obtained a judgment by confession in the amount of $2,774,803 against Blatstein pursuant to a warrant of attorney provision in the Lease. The Complaint for Confession of Judgment, filed in the Court of Common Pleas of Philadelphia County, delineated damages as follows:

I. Past Due:			
	Annual Fixed Rent	$ 93,678.93	
	Additional Rent	$ 28,574.38	
II.	Accelerated Rent		
	November 1, 1992-December 31, 1992	$ 25,193.25	
	January 1, 1993-December 31, 1993	$230,310.61	
	January 1, 1994-December 31, 1994	$239,915.61	
	January 1, 1995-December 31, 1995	$231,520.61	
	January 1, 1996-December 31, 1996	$232,125.61	
	January 1, 1997-December 31, 1997	$232,730.61	
	January 1, 1998-December 31, 1998	$254,754.00	
	January 1, 1999-December 31, 1999	$254,754.00[1]	
	January 1, 2001-December 31, 2001	$254,754.00	
	January 1, 2002-December 31, 2002	$254,754.00	
	January 1, 2003-December 31, 2003	$317,044.00	
III.	Audit Costs	$ 1,560.00	
IV.	Attorney's Commission of 5% pursuant to Paragraph 28(g) of the Lease	$132,133.48	
V.	Costs (to be added)	$_____	
VI.	Post-Judgment Interest (to be added)		$_____
Total	(Exclusive of costs and interest)		$2,774,803.09

(Arch Br. Ex. 1).

On December 8, 1992, Blatstein filed a Petition to Open Judgment, arguing that Arch's changing the locks on the doors prevented Blatstein from curing default. The Court of Common

[1] Neither the Complaint for Confession of Judgment nor the Praecipe for Assessment of Damages contains an entry for January 1, 2000 - December 31, 2000. (See Arch Br. Ex. 1).

Pleas denied Blatstein's Petition, and, on August 31, 1993, the Superior Court of Pennsylvania ("Superior Court") affirmed that decision. The Superior Court rejected Blatstein's argument that his Petition to Open raised a meritorious defense and sufficient evidence of the same:

> Appellant [Blatstein] does not contradict the facts that he was in default under the original lease and loan agreements and under the letter agreement. However, appellant alleges that he has a meritorious defense to the entry of judgment by confession. Appellant asserts that appellee [Arch] breached the letter agreement by interfering with his ability to cure the default within seven days, as provided in the letter agreement. Appellant contends that the evidence demonstrates that appellee changed the locks on the doors to the club the evening notice of default was given. This act, according to appellant, violated the seven-day cure provision in the letter agreement in that it precluded appellant from operating his business so as to raise funds to cure the default. While appellant's argument seems reasonable on the surface, appellant glosses over a very critical fact in presenting his case.
>
> Appellant states that on the evening appellee gave him notice of default under the letter agreement, appellee padlocked the premises in response to 'some activity' at the club. What appellant fails to reveal is that the 'activity' was an attempt by appellant, immediately after being served with notice of default, to remove fixtures, furniture, and stock from the club. As the record reveals, appellant was discovered at the club around mid-night on the evening that he had been served with the default notice in the act of removing equipment, furniture, etc., with the aid of sixteen men and a number of rented trucks. Such an act clearly constituted abandonment on the appellant's part. See Eckel v. Eisworth, 371 Pa. 490, 92 A.2d 174 (1952) (abandonment occurs when there is an intention to abandon coupled with conduct by which the intent is carried into affect). At that point, appellee was entitled to immediate repossession of the leasehold. See Turnaway Corp. v. Soffer, 461 Pa. 447, 336 A.2d 871 (1975). Accordingly, appellee was justified in padlocking the premises to protect property which was secured through the lease and a separate security agreement. Given appellant's acts of abandonment and attempted conversion, appellee's self help measures do

not constitute a breach of the letter agreement.

> Additionally, once the property was locked, appellee still waited seven days before commencing default proceedings. During that period, appellant never attempted to cure the default or discuss a plan for the same with appellee. Furthermore, this court will not allow appellant to claim breach of contract as a meritorious defense when, in fact, it was appellant who had repeatedly breached all of the agreements entered into with appellee.

718 Arch Street Assocs., Ltd. v. Blatstein, No. 334 Philadelphia 1993 at 4-5 (Pa. Super. Ct. Aug. 31, 1993). The Superior Court found "void of any arguable merit" Blatstein's argument that Arch's changing the locks prevented him from curing default. Id. at 5.

Attempting to recover on its confessed judgment, Arch served interrogatories in aid of execution on Main, Inc. ("Main"), a corporation Blatstein controls. (Arch Br. Ex. 6). When Main failed to respond to the interrogatories, Arch sought to enter default judgment against Main. On November 3, 1993, a default judgment was entered in the Court of Common Pleas of Philadelphia County against Main in the amount of $2,774,803.09. (Arch Br. Ex. 5). On February 21, 1996, Main filed a Petition to Open the Judgment, which was denied by the Court of Common Pleas of Philadelphia County. The Superior Court affirmed that decision. (Arch Br. Ex. 6). The garnishment proceedings did yield Arch $56, 228.51 from Jefferson Bank. (Arch Br. Ex. 14).

C. United States Bankruptcy Court Proceedings

Main and Blatstein filed their bankruptcy petitions on September 20, 1996 and December 19, 1996 respectively. Arch filed its Proofs of Claim on February 2, 1997 of $3,398,408.30 against Blatstein ($2,774,803.09 plus $623,605.29 post judgment interest) and $3,190,298.10 against Main ($2,774,803.09 plus $415,495.09 post judgment interest). In February, 1997, objections to Arch's Proofs of Claim ("Objections") were filed, alleging principally that Arch's claims should be reduced pursuant to the cap imposed under § 502(b)(6). Section 502(b)(6) provides:

> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (I) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that --
>
> * * *
>
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds --
>
> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of --
>
> (I) the date of the filing of the petition; and
>
> (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
>
> (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

11 U.S.C.A. §502(b)(6) (emphasis supplied). The Bankruptcy Court held a hearing on those Objections on April 15, 1997, taking

testimony from Blatstein and Gie Liem, Arch's principal.[2]

1. Blatstein's Calculation

The Bankruptcy Court ruled on the various Objections by Opinion and Order dated April 23, 1997. Before the Bankruptcy Court, Blatstein requested various deductions and adjustments to the Blatstein and Main claims under § 502(b)(6), including un-refunded security deposits, rent received from Illusions, the Jefferson Bank garnishment, and compensation for purportedly unreturned property. Blatstein calculated his claim as follows:

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I.     Past Due Rent
       Per Lease
             Base Rent in year 5 (1992)     $100,691/yr.
                                            ($8391/mo.)
             Expansion space in 1992        $42,000/yr.[3]
                                            ($3,500/mo.)
             Basement space in 1992         $8,470/yr.
                                            ($706 mo.)
                                            ________________
                                            $12,597/mo.

       Archco was 1 week behind as of April 6, 1992, totaling $5,000

II.    Actual Claim
       Rent due until October, 1994, when Landlord lost premises through
       foreclosure:
       A.    4/6/92 to 12/31/92                   $12,597 X 9 = 113,373
       (less 4/1/92-4/6/92 occupied until default)($2,519) = $110,854
       B.    1/1/93 to 12/31/93[4]                $204,723
       C.    1/1/94 to 9/30/94                    $153,996
                                                  ________
                                                  $469,164

III.   Section 502(b)(6) Cap -- The Greater Of:
       A. One Year's Rent (Last year of Lease) -- $160,415
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[2] Arch also filed two separate adversary proceedings against (1) Blatstein, (2) his wife, Lori Blatstein, (3) Morris Lift -- accountant for Blatstein and president of Main -- and other corporations Blatstein controls. Arch claims they are all part of a pervasive scheme to defraud Arch, and Arch is attempting to deny Blatstein a discharge under 11 U.S.C.A. § 727 ("Discharge") (West 1993). The trial of these adversary proceedings has been completed.

[3] The Bankruptcy Court listed this figure at $42,000. It is actually $44,800. (<u>See</u> Arch Br. Ex. 10).

[4] The Bankruptcy opinion listed "2/31/92" as this date.

Nine months of 1992 @ $12,597 per month plus three months of 1993 @ $15,680 per mo.
or
B. 15% of the balance of the time under the Lease:
Time remaining on lease: 4/6/92 to 12/31/03, 139.8 months.
15% of remaining term is 20.97 months @ $12,597 per month is $264,159.

IV.	Deductions From Claim	
	Security deposit under Archco Lease	$6,416
	Security deposit under March, 1988 amendment	$10,000
	Personal property retained by Landlord	$180,000
	Rent From Illusions, 10/93-10/94	$66,000
	Illusions security deposit	$11,000
	Jefferson garnishment	$56,229
		$329,645

V.	Total Claim	
	Past Due Rent	$5,000
	Plus Accelerated Rent Cap	$264,159
	Minus Deductions	$329,645
	TOTAL CLAIM	$0

In re Main, Inc., No. 96-19098DAS, at *10-11 (Bankr. E.D. Pa. Apr. 23, 1997).

2. Arch's Calculation

Arch argued to the Bankruptcy Court that § 502(b)(6) adjustments are as follows:

Total Judgment	$2,774,803.09
Past Due, 11/92	($122,253.31)
Rent, 11/92-4/93	($101,963.45)
Atty. Fees	($132,1133.48)
Audit Costs	($1,560.00)
Future Rent	$1,416,892.90

$1,416,892.90[5] X 15% = $362,533.93 of allowable future rent.

Total Claim	$362,533.93 (Allowed Future Rent)
	$224,216.76 (rent through April, 1993)
	$132,133.48 (Attorney's fees)
	$718,884.17

Id. at *12.

3. The Bankruptcy Court's Rent Cap Calculation

The Bankruptcy Court adopted the calculations made by

[5] The Bankruptcy Court listed this figure at "$2,416,892.90."

Blatstein and reduced Arch's claims against both Blatstein and Main to $269,159 -- Blatstein's $269,159 plus $5,000 in past unpaid rent. In reaching this figure, the Bankruptcy Court noted that "none of the adjustments proposed by either side appear appropriate." _In re Main, Inc._, No. 96-19098DAS, at *17 (Bankr. E.D. Pa. Apr. 23, 1997).

The Bankruptcy Court calculated the cap:

> solely on the basis of the rent due under the lease, and not on the basis of other considerations which might legitimately be considered in the normal claim resolution process. Other items, such as the amount of a judgment and allowances for security deposits, rent received from new tenants and garnishment, and the value of the personalty converted by a landlord, while arguably relevant to the determination of a landlord's claim in the normal claims process, have nothing to do with calculation of the cap.

_Id._ at *10-11. The Bankruptcy Court made a specific finding with respect to attorneys' fees:

> leases can often be adhesion contracts drafted by landlords, which attempt, for a variety of reasons which could include an awareness of § 502(b)(6), to define items which are not actually rent as 'rent.' One example is attorneys' fees. However, we limited the appendage of attorneys' fees to situations where such charges were expressly included as part of the rent . . . . We would now further refine this holding by stating that attorneys' fees due to a landlord to collect a rent deficiency are in no sense 'rent,' as defined by § 502(b)(6). _See also_, [_In re Lindsey_, 199 B.R. 580, 586 (E.D. Va. 1996)].

_Id._ at *17.

The Bankruptcy Court found that for purposes of ascertaining "rent," only "fixed, regular, and/or periodic' real estate taxes, insurance, and common maintenance charges ('CAM's') are included in the cap, excluding therefrom liquidated damages, service charges and reletting costs, and interest on any state court judgment." Id. The Bankruptcy Court therefore did not include the Amortized Improvement Costs when calculating the monthly rent.

4. Disposing of the Claim against Main

Arch argued to the Bankruptcy Court that a § 502(b)(6) adjustment should not have been made to Arch's default judgment claim against Main because it is unrelated to the Blatstein claim. The Bankruptcy Court disagreed with Arch's contention that Main's status as a garnishee exempted the application of the cap to the determination of Arch's claim against it.

> [T]he claim against Main is based upon a claim of damages against Blatstein resulting from the termination of the Lease. Arch's claim against Main as garnishee must be regarded as claiming through the debtor, as having received an equitable assignment of the debt, property or thing attached, and must not exceed the amount.

Id. at 18 (citing Pa. R. Civ. P. § 3146(b) ("Judgment against Garnishee upon Default or Admission in Answer to Interrogatories . . . . no money judgment entered against the garnishee shall exceed the amount of the judgment of the plaintiff against the defendant together with interest and costs")). The Bankruptcy Court reduced Arch's claim against Main significantly:

> Thus, if the claim of Arch against Blatstein were reduced or eliminated by its satisfaction or payments by a third party such as another garnishee, or a bankruptcy discharge of Blatstein, we do not believe that Arch's claim against Main as garnishee would survive. While we acknowledge the principle that Main cannot set up a defense to the garnishment asserted by Blatstein, see Pa. R. Civ. P. 3145(b)(2) [garnishee may assert under new matter "any defense or counterclaim which he could assert against the defendant if sued by him but he may not assert any defense on behalf of the

> defendant against the plaintiff or otherwise attack the validity of the attachment"] . . . a garnishee can assert certain defenses on the debtor's behalf . . . and it would be grossly inequitable to deprive Main of the benefit of the cap (a defense, if you will) which is not only available to Blatstein but also has been successfully invoked herein, by the primary obligor, Blatstein. This principle seems particularly appropriately applied where the primary obligor is also a debtor whose claim is also reduced under § 502(b)(6). It has been applied in the circumstances of guarantors even where the principal obligors were not themselves debtors.
>
> We would also point out that the language of § 502(b)(6) . . . applies to all claims for damages resulting from the termination of leases. Arch's claims against Main result from the termination of the Lease, albeit that its a lease with another party, and hence it fits within the scope of the language of § 502(b)(6).

In re Main, Inc., No. 96-19098DAS, at *19 (Bankr. E.D. Pa. Apr. 23, 1997).

5. Res Judicata and State Law Defenses

Arch maintained that "res judicata principles bar any defenses against Arch's claims which could have been raised in the state court litigation by Blatstein or Main, and resolve as a matter of law in this case any state law issues decided in state court relevant to the application of the cap." Id. at *9. Arch also claimed that "this [state court] judgment thus precludes, inter alia, the defenses that Blatstein was not the tenant, that it improperly retained the tenant's personalty, and efforts to deduct the un-refunded security deposits." Id. at *10. The Bankruptcy Court appeared to agree:

> The defenses asserted by the Debtors may have been relevant to the calculation of Arch's damages under state law. Unfortunately for the Debtor, they are

> confronted by Arch's judgment of $2,774,803.09 against both of them, which they have unsuccessfully pursued on an appellate level in the state courts. No fraud or lack of jurisdiction in the state court proceedings has been proven, rendering these decisions, as Arch contends, binding under principles of res judicata . . . . While arguably certain of the defenses, e.g., the identity of the tenant as Archco or Blatstein . . . the deduction of the replacement rentals and the sums garnished, and possibly the loss of personal property, might have been raised by state court to reduce Arch's mammoth claims, the Debtors are now barred from asserting such defenses in the state courts by principles of res judicata. These state court decisions were rendered after Archco's assumption of the Lease in the course of its bankruptcy. It seems clear that the state-law damage claims would greatly exceed the statutory cap of $269,159, even were some of these adjustments made, and Arch's claims therefore will [not] be reduced below the cap on account of these defenses.

Id. at 21.

II. Standard of Review

"[I]n bankruptcy cases, the district court sits as an appellate court." In re Cohn, 54 F.3d 1108, 1113 (3d Cir. 1995). "As a proceeding tried initially before the Bankruptcy Court for the Eastern District of Pennsylvania, the standard of review for the district court is governed by Rule 8013." Id. Federal Bankruptcy Rule of Civil Procedure 8013 provides:

> **Dispositions of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact**
>
> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Fed. Bankr. R. Civ. P. 8013. "Under 28 U.S.C. § 158(a), the district court . . . is not authorized to engage in independent fact finding. Indeed, under the appropriate standards of review, the district court reviews the bankruptcy court's findings in a core proceeding only for clear error." In re Indian Palms Assocs., Ltd., 61 F.3d 197, 210 n.19 (3d Cir. 1995) (citing Fed. R. Bankr. P. 8013).

"Findings of fact by a trial court are clearly erroneous when, after reviewing the evidence, the appellate court is left with the definite and firm conviction that a mistake has been committed." Cohn, 53 F.3d at 1113 (citation omitted).

> The clearly erroneous standard is fairly stringent: It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination is either completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supporting evidentiary data.

Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc., 57 F.3d 1215, 1223 (3d Cir. 1995) (citation omitted). "Furthermore, in reviewing the bankruptcy court's factual findings we are to give 'due regard' to the opportunity of that court to judge first-hand the credibility of witnesses." Id.

The district court applies "a clearly erroneous standard to findings of fact . . . [and] a de novo standard of review to questions of law. Additionally, mixed findings of fact and law must be separated with the appropriate standard applied to each component." Berkery v. Comm'r Internal Revenue Serv., 192 B.R. 835, 837 (E.D. Pa. 1996) (citing inter alia Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102 (3d Cir. 1981)), aff'd, 111 F.3d 125 (1997).

III. Discussion

A. 502(b)(6) Generally

The legislative history of § 502(b)(6) states that this provision is "designed to compensate the landlord for his loss while not permitting a claim so large as to prevent other general unsecured creditors from recovering a dividend from the estate." 4 Collier on Bankruptcy ¶ 502.03[7][a]. Generally, the cap imposed is calculated as follows:

> The claim of the landlord for damages resulting from termination of a lease of real estate is limited to the rent reserved by the lease, without acceleration, for the greater of either one year or 15 percent, not to exceed three years, of the remaining lease term following the earlier of the petition date or the date on which the landlord repossessed or the lease debtor surrendered the property. In addition, the landlord is afforded a claim for any unpaid rent due under a lease, without acceleration, as of either the date of the filing of the petition or the date on which the landlord repossessed the premises or the lessee surrendered them, whichever is earlier.

Id. This limit is absolute and premised on "fairness rather than a rule of convenience." Id.

> The legislative history of § 502(b)(6) [further] indicates that the limitation on allowable claims of lessors of real property was based on two considerations. First, the amount of the lessor's damages on breach of a real estate lease was considered contingent and difficult to prove. Second, in a true lease of real property, the lessor retains all the risk and benefits as to the value of the real estate at the termination of the lease. Historically, it was, therefore, considered equitable to limit the claims of a real estate lessor.

In re Episode USA, Inc., 202 B.R. 691, 693 (S.D.N.Y. 1996).

The landlord bears the burden of proof under § 502(b)(6). See 4 Collier on Bankruptcy ¶¶ 502.03[7][c], [d] ("If the landlord files a claim for damages predicated upon such termination, the landlord must prove and substantiate the claim as to both the incidence and the measure of damages"). Once the landlord has satisfied the burden of showing the damages resulting from the termination of the lease, the allowable claim is limited to the aforementioned formula "plus, under subparagraph (B) of that section, any unpaid rent which was due under the lease, without acceleration, on the earlier of the dates described in paragraph (A)." Id. at ¶ 502.03[7][e].

B. Res Judicata and the § 502(b)(6) Calculation Date

1. Parties' Positions

Arch asserts the Bankruptcy Court erred by determining that the Lease terminated on April 6, 1992 and thereby improperly calculated "Past Due" rent. According to Arch, the surrender and repossession issues were already resolved with reference to state law and are therefore res judicata for purposes of Arch's claim. Arch cites to In re Calvert, 105 F.3d 315, 316 (6th Cir. 1997) ("[o]n appeal, we are asked to determine whether a default judgment obtained in state court, where the defendant did not defend the suit, has collateral estoppel effect against the debtor in a subsequent bankruptcy proceeding where the dischargeablility of the debt is at issue . . . . [W]e conclude that it does").

Applying res judicata, argues Arch, the Lease was not terminated through surrender or possession prior to judgment. According to Arch, I should use June 1, 1993, the date Illusions occupied the premises, as the date upon which Arch repossessed the premises.[6] Arch maintains that between April 6, 1992 (the night Blatstein attempted to steal the equipment) and June 1, 1993, no other tenant either occupied the premises or requested to occupy the premises, and Arch never contacted Blatstein to terminate the Lease. (Tr. Hearing 4/17/97 at 50-51, 107).

Blatstein argues the state court decisions are not res judicata because they dealt with a different issue: "whether the padlocking of the premises by the Landlord relieved the tenant of any further obligation to pay rent, in light of the language of the lease which provided for a claim for accelerated future rent in the event of a default by the tenant." (Blatstein Br. at 11). By contrast, contends Blatstein, the issue before the Bankruptcy Court was "the date of lease termination so that the Bankruptcy Court could determine the portion of the Landlord's claim for actual rent and properly determine the date for the commencement of the period subject to the rent cap (the future rental period)." (Blatstein Br. at 11). (See Blatstein Br. at 12 ("[t]he Bankruptcy Court properly concluded that the Debtor's State Court argument relating to abandonment of the property was in fact contesting that the eviction was improper. It was not a determination of the meaning of Section 502(b)(6) of the Bankruptcy Code")).

Blatstein also contends the evidence supports a finding that the Lease terminated when Arch locked Blatstein out on April 6,

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[6] The Arch brief vacillates between May 3, 1993 (when Illusions Lease executed) and June 1, 1993 (when Illusions took possession). (Compare Arch Br. at 27 with Arch Br. at 34). Curiously, Arch's calculations use April 3, 1993 as the § 502(b)(6) calculation date.

1992. Blatstein testified that he was thereafter denied permission to enter the padlocked premises, and that Arch retained all the personal property and documents relating to the nightclub. Thereafter, argues Blatstein, Arch "exercised full control of the premises, ultimately inventorying personal property there, obtaining bids for renovations and re-leasing the space." (Blatstein Br. at 11).

2. Analysis

Section 502(b)(6) looks to two dates to compute the damage calculation: (1) the earlier of the date of the filing of the petition and (2) the date on which such lessor repossessed, or the lessee surrendered, the leased property. "[T]he date upon which the leased premises were either 'repossessed' or 'surrendered' for purposes of § 502(b)(6)(A)(ii) is that date upon which the lease was terminated under state law." Fifth Ave., 203 B.R. at 380.

Under Pennsylvania law:

> Before an act of surrender by a tenant can be held to relieve the tenant from further liability under a lease, the landlord must accept the surrender. When determining if a surrender of the lease occurred, the intention of the parties govern. Whether the landlord accepted the tenant's surrender is a question of fact for the jury. The burden is on the tenant to show by clear and convincing evidence that the landlord's actions constituted acceptance of the tenant's surrender. It must be shown that the landlord made some 'unequivocal act' that would constitute acceptance of the tenant's surrender.

Stonehedge Square Ltd. Partnership v. Movie Merchants, Inc., 685 A.2d 1019, 1023 (Pa. Super. Ct. 1996) (citations omitted), appeal allowed in part, 1997 WL 414565 (Pa. July 18, 1997) (limiting appeal to question of "[w]hether the Superior Court's decision to rely on this Court's decision in Auer v. Penn, 99 Pa. 370 (1882) [(landlord has no duty to mitigate damages)] was improper?"). If a tenant abandons demised premises during the term of the lease,

> the landlord is not bound, under the penalty of loss of his right to receive rent, to permit the tenement to remain wholly unoccupied with the consequent possible or probable loss of his insurance, destruction by waste, or other like injuries. The mere fact that he resumes possession is not of itself a sufficient foundation upon which to predicate an acceptance of surrender. It must further be found on evidence that such resumption of possession is not merely for the protection of the property during the absence of the tenant, but is adverse to a reoccupation of it by him and a renewal of the relations created by the lease.

Stonehedge, 685 A.2d at 1022 (emphasis supplied)(citing Kahn v. Bancamerica-Blair Corp., 193 A. 905, 907 (Pa. 1937)).

A landlord may obtain repossesion of the premises through eviction. "An eviction is any unlawful act of a landlord which deprives a tenant of the beneficial enjoyment of the demised premises and which manifests an intent to hold adversely to the tenant. An eviction suspends the obligation of a tenant to pay rent." Walnut-Juniper Co. v. McKee, Berger & Mansueto, Inc., 344 A.2d 549, 550-51 (Pa. Super. Ct. 1975).

In the instant case, the application of § 502(b)(6) involves, inter alia, a determination of Arch's actual damages claims. With respect to such actual damages claims, the state court judgment is preclusive and it is that amount which must be compared to the § 502(b)(6) cap. See In re Fifth Ave. Jewelers, Inc., 203 B.R. 372, 382 (Bankr. W.D. Pa. 1996)("Indeed the state court judgment has res judicata effect in this Court for the purpose of establishing the actual damages incurred by Great East at December 1, 1994, as a result of Fifth Avenue's breach of the lease agreement"); In re Kovalchich, 175 B.R. 863, 871 (Bankr. E.D. Pa. 1994) ("It is hornbook law that, once a state court judgment becomes final and is no longer subject to appeal, it may not be collaterally attacked by the parties in subsequent litigation, either in the state court or in a federal court").

Although § 502(b)(6) is not ultimately driven by state law, underlying final state court findings can be given preclusive effect when reference to state law is contemplated by the bankruptcy code. With respect to calculation of the cap, § 502(b)(6)(A)(ii) requires a determination of whether and when the landlord repossessed or the tenant surrendered the property. Reference to state law regarding lease termination is contemplated by the bankruptcy code. See Integrated Solutions, Inc. V. Service Support Specialties, Inc., No. 96-5597, slip op. at 9-10 (3d Cir. Aug. 22, 1997) (remarking "the Bankruptcy Code was written with the expectation that it would be applied in the context of state law and that federal courts are not licensed to disregard interests created by state law when that course is not clearly required to effectuate federal interests" and noting "absent a countervailing federal interest, the basic federal rule is that state law governs") (citations omitted).

I also look to Pennsylvania law to determine whether state court findings can have res judicata effect in the case sub judice. See In re Gober, 100 F.3d 1195, 1201 (5th Cir. 1996) ("we must look to the state that rendered the judgment to determine whether the courts of that state would afford the judgment preclusive effect") (citation omitted). I agree with Arch that Pennsylvania law gives the state court decisions preclusive effect under appropriate circumstances.

In this case, material issues pertaining to the surrender and termination have been finally decided by the Superior Court of Pennsylvania which should be given preclusive effect for § 502(b)(6)(A)(ii) purposes. Specifically, the Superior Court found that (1) Blatstein did not surrender the property on April 6, 1992 and (2) that Arch did not "repossess" on that date. I give preclusive effect to the finding that on April 6, 1992, Arch justifiably pad-locked the doors to protect its property.

I also agree with Arch that had the Superior Court found either surrender or repossession / eviction, it would not have upheld the judgment for accelerated rent pursuant to the Lease. <u>See</u> <u>Finkel v. Gulf & W. Mfg. Co.</u>, 744 F.2d 1015, 1021 (3d Cir. 1984) (referring to "Pennsylvania rule that even upon breach of a material condition in a commercial lease a landlord must elect <u>between</u> repossession and actual damages <u>or</u> acceleration of the balance due") (citations omitted); <u>Homart Dev. Co. v. Sgrenci</u>, 662 A.2d 1092, 1100-01 (Pa. Super. Ct. 1995) (the landlord "cannot recover both the possession and the rent for the balance of the term . . . . a landlord can confess a judgment for future rent accruing under the acceleration clause, or a judgment in ejection, <u>but</u> <u>not</u> <u>both</u>"). In the absence of any acceptance by Arch, Blatstein did not "surrender" the premises on April 6, 1992.

Also, Arch's action on April 6, 1992, was not sufficiently adverse to Blatstein's interest to constitute "repossession." See Kahn, 193 A. at 907 ("[i]t must further be found on evidence that such resumption of possession is not merely for the protection of the property during the absence of the tenant, but is adverse to a reoccupation of it by him and a renewal of the relations created by the lease"). I understand repossession to constitute either (1) exercising exclusive dominion and control over property with the intent to terminate the lease or (2) engaging in conduct adverse to either the tenant's reoccupation of the premises or its ability to renew the lease relationship. Preventing access to the property as a purely protective measure does not, under state law, amount to repossession. Repossession signals that point in time when Arch engaged in conduct inimical to Blatstein's ability to recover or resume his status under the Lease.

Giving the Superior Court decision preclusive effect, I therefore conclude that on April 6, 1992, Arch neither surrendered nor repossessed the premises. The Superior Court's preclusive findings, however, relate only to events and conduct of April 6, 1992. The Superior Court reveals nothing about the actual surrender or repossession subsequent to that date. There may have come a point in time after April 6, 1992 when Arch's control over the premises expanded to the point where Arch exercised dominion and control over the premises sufficiently adverse to Blatstein's interests such that Arch "repossessed" the property.

Based upon the record before me, however, a determination cannot be made as to the exact date when Arch "repossessed" the property. The Bankruptcy Court used April 6, 1992 without (1) revealing its interpretation of "surrender" and "repossession" under § 502(b)(6) or (2) making findings of fact with respect to either Blatstein's "surrender" or Arch's "repossession." I refrain from making that determination and therefore remand this case to the Bankruptcy Court for findings consistent with this Opinion.

C. "Rent Reserved" Calculation

Arch protests that the Bankruptcy Court's use of the base rent did not include the Amortized Improvement Cost of $25,587.36 year. The Amortized Improvement Cost, argues Arch, was clearly "rent" under the lease, a regular charge that was paid to Arch as part of monthly payments. Blatstein contends that the facts clearly establish the Amortized Improvement Cost is not rent. Blatstein calls for a strict interpretation of § 502(b)(6) -- "rent reserved under such lease" -- arguing that "rent" does not include other charges due the landlord under the Lease.

To determine whether certain charges in addition to unpaid rent can be included in the cap, Fifth Ave. adopted a Ninth Circuit approach:

> (1) In order for an additional charge to be included in the cap, the charge must: (a) be designated as 'rent' or 'additional rent' in the lease; or (b) be provided as the tenant's/lessee's obligation in the lease; (2) The charge must be related to the value of the property

> or the lease thereon; and (3) The charge must be property classified as rent because it is a fixed, regular or periodic charge.

Fifth Ave., 203 B.R. at 381 (citing In re McSheridan, 184 B.R. 91, 99-100 (9th Cir. Bankr. App. 1995)). Fifth Ave. declined to follow the approach taken in In re Conston Corp., Inc., 130 B.R. 449 (Bankr. E.D. Pa. 1991), "where in the Court held that 'appendages to pure rent are allowable as rent reserved under § 502(b)(6) only if the lease expressly so provides and the charges in question are properly classifiable as rent because they are regular, fixed, periodic charges payable in the same way as pure rent.'" Fifth Ave., 203 B.R. at 381 n. 11 (citation omitted). Instead, Fifth Ave. followed McSheridan. See id. at 381 n.11 ("this Court agrees with the Court in McSheridan that bankruptcy courts must make an independent determination of what constitutes 'rent reserved' because labels alone may be misleading") (citation omitted).

I decline to take the Conston approach and instead choose to apply the three factor test articulated in Fifth Ave.. See Fifth Avenue, 203 B.R. at 381 n.11 (declining to follow Conston); McSheridan, 184 B.R. at 98 (discussing Conston but not accepting it); In re Rose Stores, Inc., 179 B.R. 789, 790 (Bankr. E.D.N.C. 1995) ("The Court rejects the two part test of [Conston]") (citing In re Heck's, Inc., 123 B.R. 544, 546 (Bankr. S.D.W. Va. 1991)).

I respectfully disagree with the Bankruptcy Court's interpretation of Fifth Ave.. The Bankruptcy Court erroneously limited Fifth Ave. as holding that only fixed, regular, and periodic real estate taxes, insurance, and common maintenance charges ("CAMs") are included in the § 502(b)(6) cap calculation. See In re Main, Inc., No. 96-19098DAS, at *17 (Bankr. E.D. Pa. Apr. 23, 1997) (Fifth Ave. "concludes that only 'fixed, regular, and/or periodic' real estate taxes, insurance, and common maintenance charges ('CAM's') are included in the cap"). The Bankruptcy Court then circumscribed Fifth Ave. even further by declaring that "rent" includes only the CAMs. See id. ("We would probably be inclined to include no more than CAM's as an item of 'rent' in performing a § 502(b)(6) calculation. The other items do not appear in line with what we believe is the narrow category of 'rent' alone"). Contrary to the Bankruptcy Court's narrow reading of Fifth Ave., I conclude Fifth Ave. expansively defines rent as anything that is designated as rent in the lease, is related to the value of the property, and is a fixed, regular, or periodic charge. "Rent" includes any payments satisfying these three requirements and is not limited to real estate taxes, insurance, and CAMs.

Application of the rent definition crafted in Fifth Ave. compels the conclusion that the Amortized Improvement Cost was clearly rent under the Lease. The Lease specifically articulates three monthly payments: "Base Rent," "Amortized Improvement Costs," and "Total Rent." Total Rent equals the sum of Base Rent and Amortized Improvement Costs. (See Arch Br. Ex. 10). (See Tr. Hearing 4/15/97 at 142 (Blatstein testifying that he wrote one check every month for the amount listed in the total rent column of the Lease (Base Rent + Amortized Improvement Costs))).

The Amortized Improvement Cost, as a component of "Total Rent," is specifically designated as "rent" in the Lease.

The record contains evidence that the Amortized Improvement Cost related to the value of the premises. According to Arch, money was invested, which was represented by the Amortized Improvement Cost, for Blatstein's benefit to enhance the value of Blatstein's leasehold interest. (See Tr. Hearing 4/15/97 (Liem, Arch principal, stating Arch put in $550,000 in improvements for Blatstein, a portion of those improvements, $227,000, was factored into the Lease and amortized over the full length of the Lease, and the remainder, $300,000 was "an investment that the landlord made as an inducement for the lease")).

Finally, the Lease reveals that the Amortized Improvement cost was a fixed, regular, and periodic charge. (See Arch Br. Ex. 10). Accordingly, "rent reserved under the lease" includes the Amortized Improvement Cost.

D. Basis for Cap -- Rent or Time

Arch complains that the Bankruptcy Court wrongly calculated the damages under § 502(b)(6) by examining the time remaining under the Lease and multiplying that figure by 15%. Instead, argues Arch, the 15% should be multiplied by the remaining rental payments due under the Lease.

I find a split of authority over whether the 15% quantifier is a function of rent or time. In re Gantos, 176 B.R. 793 (W.D. Mich. 1995) took the "rent" approach:

The Court finds it fair to base rejection damages on

> the total rent bargained for by the parties and fails to understand how landlords will unjustly benefit from doing so. Historically, the limitation on allowable claims of real property lessors was based on two considerations. First the amount of the lessor's damages on breach of a real estate lease was considered contingent and difficult to prove. Second, in a true lease of real property, the lessor retains all risks and benefits as to the value of the real estate at the termination of the lease. 124 Cong. Rec. H11094 (daily ed. Sept. 28, 1978). Therefore, since the landlords assume the risk that their lessors may file bankruptcy, they should not be stripped of any bargained for benefit in the terms of the leasing agreement.
>
> Further, the Court does not believe that legislative intent will be frustrated by permitting landlords to recover damages based on the aggregate rent remaining under the lease. Allowing them to do so will more accurately compensate them for their loss while the 15% limitation on the rent recoverable will concomitantly ensure that other general creditors will have an opportunity to recover from the estate.
>
> Second and more importantly, the Court believes that the statute allows for lease rejection damage claims with a damage cap based on rent and time, with the claim being limited to the rent unpaid on the date of bankruptcy plus the greater of one year's rent under the lease or 15% of the rent remaining under the lease, but not to exceed three years rent. The 15% quantifies the aggregate rent remaining and not the time remaining under the lease. Although, not a model of clarity, this appears to be the most natural interpretation of the statutory language. A majority of case law supports this position. See In re McLean Enterprises, Inc., 105 B.R. 928 (Bankr. W.D. Mo. 1989); In re Communicall Cent., Inc., 106 B.R. 540 (Bankr. N.D. Ill. 1989); In re Q-Masters, Inc., 135 B.R. 157 (Bankr. S.D. Fla. 1991); In re Bob's Sea Ray Boats, Inc., 143 B.R. 229 (Bankr. D.N.D. 1992); In re Financial News Network, Inc., 149 B.R. 348 (Bankr. S.D.N.Y. 1993).

Gantos, 176 B.R. at 796. Other courts have referred to this approach as the "majority view." See In re Today's Woman of Florida, Inc., 195 B.R. 506, 507 (Bankr. M.D. Fla. 1996) ("the majority of courts interpreting [§ 502(b)(6)] have concluded that the 15% cap must be calculated with reference to the total amount of the rent remaining due, as opposed to the total amount of time remaining under the lease. This view is also supported by respected treatises") (citations omitted).

The United States District Court for Western Pennsylvania has taken a contrary position.

> After carefully analyzing the statute and its legislative history, the bankruptcy court interpreted 'the remaining term' to specifically refer to the total amount of time remaining in the term of the lease as opposed to the total amount of rent reserved under the lease. Lincoln Liberty challenges the bankruptcy court's interpretation. Lincoln Liberty points out that by applying § 502(b)(6) to the next succeeding period of time rather than to the rent reserved for the remaining term, Allegheny gained a benefit from a free rent period at the beginning of the lease period. Lincoln Liberty contends that this was unfair and that the bankruptcy court should have averaged the free rent and increased rent over the life of the lease.
>
> Once again, we agree with the bankruptcy court's interpretation of § 502(b)(6). As that court explained, § 502 generally speaks in terms of time periods for which rent is due after termination of the lease. Specifically, the statute provides that claims cannot exceed the greater of one year, or 15 percent, not to exceed three years, of the remaining term, following the earlier of the date of the filing of the petition and the date surrendered. The statute is written in terms of time. The bankruptcy court's analysis of the legislative history demonstrates that Congress intended the phrase 'remaining term' to be a measure of time, not rent.

In re Allegheny Int'l, Inc., 145 B.R. 823, 828 (W.D. Pa. 1992). See also In re Iron-Oak Supply Corp., 169 B.R. 414, 420 (Bankr. E.D. Ca. 1994) ("[t]he correct interpretation, however, is that the Congress intended that the phrase 'remaining term' be a measure of time, not rent. The statute is worded in terms of time periods") (citation omitted).

I agree with the Allegheny approach. Reading the statute any other way simply does not make sense. Section 502(b)(6) states "the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease . . . ." Because "not to exceed three years" immediately follows "15 percent," the 15% figure must apply to the time remaining and not the rent remaining. 15% of the remaining time under the lease cannot exceed 3 years. If the limit was "not to exceed X dollars," then the majority view might make sense. Since the statute specifically limits the time remaining under the lease to three years, I conclude that the 15% applies to "time" remaining.

E. Application of Time Method

Arch claims the Bankruptcy Court did not properly apply the time method. According to Arch, after calculating the remaining time of the lease (139.8 months) and multiplying that figure by 15% (20.97 months), the Bankruptcy Court wrongly applied the rent in effect at the time of termination. Arch argues the Bankruptcy Court failed to account for increases in rent during the 20.97 months following lease termination. The proper method, contends Arch, requires that the rent for the next succeeding term be applied to the 15% cap. I agree. See In re Iron-Oak, 169 B.R. at 420 ("[t]he phrase 'without acceleration' only makes sense in terms of a reference to the next succeeding periods under the lease. Taking 15% of all the rent for the remaining term, especially where escalation clauses are present, would be tantamount to effecting an acceleration"); In re Allegheny Int'l, Inc., 136 B.R. 396, 403 (Bankr. W.D. Pa. 1991) ("upon review of the plain language in light of the legislative history of the statute and related case law, the court finds that the 'or 15 percent' cap applies to the next succeeding term remaining in the lease"), aff'd, 145 B.R. 823 (W.D. Pa. 1993).

F. Attorneys' Fees

Arch argues that the "Attorney's Commission" of $132,133.48 was not specifically designated as rent in the Lease and should therefore be awarded without reference to the statutory cap, citing Lindsey, 199 B.R. at 586 ("the lease at issue clearly states that the recovery of attorneys' fees is not 'payment specifically denominated as rent' which is what triggers § 502(b)(6). This Court finds that the bankruptcy court correctly awarded attorneys' fees independently from the statutory cap of fifteen percent") (citation omitted). I disagree.

Section 502(b)(6) applies to the “claim” of the lessor for damages resulting from lease termination. Here, the Complaint for Confession of Judgment attached to Arch’s Proofs of Claim delineates attorneys’ fees as an item of damages in addition to past and accelerated rent. (See Arch Br. Ex. 7). As such, attorneys’ fees are nothing more than a component of the lessor’s “claim” and are subject to the § 502(b)(6) cap. The cap represents the maximum amount recoverable as a result of the termination of the lease, thereby precluding the payment of attorneys’ fees as additional damages. Accordingly, I will not award attorneys' fees.

G. Debtor Main

Arch argues that the Bankruptcy Court erroneously applied the § 502(b)(6) cap to Arch's claim against Main. I agree with the Bankruptcy Court's approach of looking beyond form to the substance of the claim. Such an inquiry compels the conclusion that Arch's claim against Main is actually one for rent under the Lease, and Arch's claim against Main cannot exceed its claim for rent against Blatstein.

Attempting to recover on its confessed judgment, Arch served interrogatories in aid of execution on Main. The garnishment proceeding is derivative of the action against Blatstein for rent. For purposes of determining whether the provisions of § 502(b)(6) apply, I look to the basis of the claim. While the judgment obtained against Main arose out of garnishment proceedings, the basis for the claim relates back to the Lease. Section 502(b)(6) applies if the claim is in the nature of a claim for termination of a lease. The intent and spirit of this statutory provision dictates that it applies to Main. Moreover, I note that Main had a direct relationship with Blatstein. As a corporation Blatstein controlled, Main constitutes a "quasi" alter ego. (See Tr. Hearing 4/15/97 at 37 (Blatstein was director and sole officer of Main, and Main was owned by Blatstein and his wife)). Accordingly, I will cap the damages assessed against Main in the same manner as those assessed against Blatstein.

H. Security Deposit

The Bankruptcy Court must reduce any claim assessed against Blatstein by the security deposit which Arch holds. Collier provides instruction which summarizes the relevant case law:

> Although section 502(b)(6) does not speak to the point, the comments by both the House of Representatives and the Senate make clear that the vitality of Oldden v. Tonto Realty Co.[, 143 F.2d 916 (2d Cir. 1944)] remains undiminished at least insofar as that case held that the amount of security held by a landlord was to be deducted from the allowable claim under Section 63a(9) of the 1898 Bankruptcy Act. Apparently stating a guide for future judicial determinations, the legislative comments observe that the landlord
>
> > will not be permitted to offset his actual damages against his security deposit and then claim for the balance under this paragraph. Rather, his security deposit will be applied in satisfaction of the claim that is allowed under this paragraph.
>
> Accordingly, to the extent that a landlord will have a security deposit in excess of the amount of the claim allowed under section 502(b)(6), the excess will be turned over to the trustee to be administered as part of the debtor's estate. To the extent that the security deposit is less than the amount of the allowable claim as provided for by section 502(b)(6), the security deposit will be applied in satisfaction of the claim thus allowed. Section 506(a) also supports this view.

4 Collier on Bankruptcy ¶ 502.03[7][a]. See In re All For a Dollar, Inc., 191 B.R. 262, 264 (Bankr. D. Mass. 1996); In re Atlantic Container Corp., 133 B.R. 980, 989 (Bankr. N.D. Ill. 1991); Conston, 130 B.R. at 452; Communicall, 106 B.R. at 544; In re Danrik, Ltd., 92 B.R. 964, 967-68 (Bankr. N.D. Ga. 1988).[7]

[7] Arch argues that the Bankruptcy Court erroneously found that (1) the cover page of the Lease did not identify the tenant and (2) Arch did not credit the debtors for monies collected during garnishment. These factual disputes, however, are irrelevant to the current task: assessing the correct application of § 502(b)(6) to Arch's claim for rent. Accordingly, I decline to address them.

IV. Conclusion

For the foregoing reasons, I will reverse in part and affirm in part and remand to the Bankruptcy Court for further proceedings consistent with this Opinion.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ERIC J. BLATSTEIN	:	CIVIL ACTION
IN RE: MAIN, INC.	:	No. 3739

O R D E R

AND NOW, this 26 th day of August, 1997, upon consideration of Brief of Appellant 718 Arch Street (Doc. No. 4), Brief of Appellees in opposition thereto (Doc. No. 6), and an Oral Argument held on Tuesday, August 19, 1997, **IT IS HEREBY ORDERED THAT**:

1. The Bankruptcy Court's decision is **AFFIRMED IN PART AND REVERSED IN PART**.
2. I will **REMAND** this case to the Bankruptcy Court for further proceedings consistent with this Opinion.
3. Appellant Arch Street's Motion to Strike the Cross Appeal of Appellee Eric J. Blatstein (Doc. No. 3) is **DENIED AS MOOT.**[8]

BY THE COURT:

John R. Padova, J.

[8] Debtors' counsel stated, during oral argument, that Debtors' Counter-statement of Issues was not intended as an appeal.